Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,
Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 4, 2003

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QUESTIONS PRESENTED

1. Under the "well-pleaded complaint rule," do the federal courts have removal jurisdiction over lawsuits filed in State court and arising under State law, in which the relevant complaints disclose no federal basis for suit, solely because the defendants (and the United States as *amicus curiae*) contend that the actions are barred by a treaty of the United States?

2. Is it open to a federal appellate court to speculate as to how the highest court of a State would resolve a question of interpretation of State law, when the only two State appellate court decisions on point are in direct conflict and the matter is currently set for resolution by the State Supreme Court?

3. Does the 1951 Treaty of Peace with Japan, on a proper reading of all of its terms, prohibit the assertion of private causes of action by Americans against private Japanese companies that enslaved them, brutalized them, and profited from their unpaid labor, even though no treaty in the history of this Republic has ever been held by this Court to preclude the assertion of private rights of action by private citizens against foreign non-government defendants?

STATEMENT OF CORPORATE AFFILIATIONS

All Petitioners are individuals, and there are no corporate affiliations to disclose on their side.

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Petitioners Lester Tenney *et al.* respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Northern District of California.

OPINIONS BELOW

The decision of the Ninth Circuit is reported *sub nom. Deutsch v. Turner Corporation*, at 317 F.3d 1005, *as amended at* 324 F.3d 692 (9th Cir. 2003). It is reprinted in the Appendix hereto ("App."), at pp. 1a-65a. This decision consolidated 28 cases brought by prisoners of war in the Pacific Theater, as well as one case initiated by a European Holocaust survivor. The instant Petition is filed on behalf of Plaintiffs in 11 of those cases, brought by American citizens who were enslaved by private Japanese companies.

The decision of the U.S. District Court for the Northern District of California is reported *sub nom. In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp.2d 939 (N.D. Cal. 2000). It is reprinted at App., pp. 66a-80a.

JURISDICTION

Rehearing and en banc reconsideration of the decision in the Ninth Circuit were denied on March 6, 2003. App., pp. 1a-16a. Pursuant to order of the appeals court, the mandate has not issued, pending this Court's disposition of *American Insurance Association v. Low*, 123 S. Ct. 817 (2003) (granting certiorari). *See* App., p. 16a. This stay of mandate does not, however, affect the timing of the instant Petition: *see* Rule 13.3 of the Rules of this Court.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The treaties and statutes at issue are certain articles of the Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 (1951), reprinted at App., pp. 81a-114a, and California Code of Civil Procedure § 354.6, reprinted at App., 119a-120a.

STATEMENT OF THE CASE

1. The Facts of the Underlying Litigation.

Petitioners, all of whom are United States citizens, are the survivors of a group of true American heroes. Their claims are based on the brutal abuse they experienced at the hands of Japanese *zaibatsu* (private business conglomerates), including Respondents, after they were taken as prisoners of war in World War II, and were sold to those companies, which forced them to labor without compensation.[1]

Petitioners contended in their complaints, and are prepared to demonstrate at trial, that their abusers were acting not as agents of the Japanese government, but as profit-making enterprises, enriching themselves by imposing egregious deprivations on innocent Americans and other Allied POWs.

The sufferings imposed by the *zaibatsu* on these victims have been recounted from numerous perspectives. The perversity of the mistreatment of these men – outside the laws, customs, and conventions of war which all civilized nations were and are now obligated to honor -- will always remain a dark shadow over the history of the twentieth century.

Respondents, acting for their own war-profiteering purposes, exploited private commercial opportunities through Petitioners' forced labor. At least since 1945, these conglomerates have thrived beyond the wildest imaginings of which their principals would have been capable, either before or after the War. Privately-owned and -operated business entities, they could not have achieved these levels of success had they not survived to enrich themselves in the reinvigorated post-War Japanese economy; and they could not have survived the War without the uncompensated labor

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[1] Pursuant to California Code of Civil Procedure § 354.6, Petitioners also include the U.S.-incorporated affiliates of these Japanese business entities.

of POWs like these Petitioners, who were captured and pressed into slavery.

2. The State Court Litigation.

Petitioners brought these actions in California State courts to obtain a remedy, which they deserve as a matter not just of basic fairness but of law, against those who enslaved them, tortured them, and exploited their labor without mercy or compensation. These are not cases against the government of Japan, despite the unrelenting efforts of Respondents, supported by the Department of State, to characterize them in that way. They are founded in common law and equity, seeking tort damages, unpaid wages, and the restitution of unjust enrichment.

The cases were brought by private individuals against private commercial entities, seeking relief measured by the fruits of unpaid labor, and to recompense grievous wrongs committed by private employers against a segment of their workforce. Petitioners were permitted to bring these cases under an express extension of the statute of limitations adopted by the California State Legislature in 1999: California Code of Civil Procedure § 354.6 (*see* App., p. 115a-16a, *infra*).

The State court suits, in other words, arose under California law, and were filed in California courts. Nevertheless, they were removed to the federal courts, and ultimately transferred (with others as well) by the Judicial Panel on Multidistrict Litigation to the U.S. District Court for the Northern District of California, where they were consolidated by Judge Walker for pretrial purposes.

There is no basis for federal jurisdiction over these cases.[2] The complaints do not so much as make reference to federal law in their allegations of fact or prayers for relief.

Despite Respondents' attempts to portray Petitioners as seeking judicial review of acts and decisions consigned by

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[2] The presence of California plaintiffs and defendants precludes federal jurisdiction based on diversity of citizenship.

the Constitution exclusively to the competence of the federal government, and indeed to its Executive branch, these cases fall squarely within the scope of the authority of every State to assure the enforcement of wage claims, and to punish mistreatment of its citizens even when they are employed by foreign nationals or corporations. It is commonplace for State courts to hear and to adjudicate civil actions relating to refusals to pay wages and similar abusive conduct by foreign employers, so long as jurisdiction over the subject matter and the person of the defendant is properly lodged. That the events at issue here happened in Japan is no bar: courts in the United States regularly consider and resolve cases alleging actionable wrongdoing in other places.

Nevertheless, remand to State court was denied by Judge Walker, who proceeded to exercise jurisdiction over these cases.[3] Despite the subsequent holding of the Ninth Circuit in *Patrickson v. Dole Food Company, Inc.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 251 F.3d 795 (2003), the district court declined to revisit its decision.

3. Disposition in the District Court.

Before the district court, Respondents opposed Petitioners' motions to remand, and moved to dismiss or for judgment on the pleadings, on four grounds. They alleged that the claims were barred by: (a) the 1951 Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 ("the Treaty") ; (b) the political question doctrine; (c) the preemptive effects of the Treaty, the War Claims Act of 1948, 50 U.S.C. §§ 2001-2017p, and "the federal government's plenary authority over foreign affairs"; and (d) the act of state doctrine and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*

The district judge, after declining to remand the cases for lack of subject-matter jurisdiction, granted Respondents'

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[3] Other federal Judges did remand other Japanese Prisoner of War cases to California State courts, where they remain. *See, e.g., Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39 (2003) (discussed *infra* at p. 6).

motions, but for only one of the proffered reasons. He held that the Treaty unambiguously constituted a waiver of these causes of action. He found further support for this position in his analysis of the negotiation and ratification of the Treaty.

4. The Opinion of the Ninth Circuit.

The Ninth Circuit consolidated the cases brought by American citizen plaintiffs with litigation initiated by nationals of both signatories and non-signatories of the San Francisco Treaty. Also consolidated was an action brought by a European Holocaust survivor against a German company, alleging enslavement and pursuing a claim for damages.

The Ninth Circuit Panel issued an opinion far more limited in scope than that of Judge Walker below. The circuit court held that the section of the California Code of Civil Procedure extending the limitations period was a substantive, and hence an impermissible, intrusion by a State into the federal government's constitutional prerogative to conduct foreign affairs. The court opined that the federal resolution *inter alia* of the cases now at Bar was incorporated into the 1951 Treaty, effectively precluding the maintenance of these suits.

After concluding its analysis of the constitutionality of the State statute, the court went on to address the question of whether there was federal jurisdiction over these cases at all, or whether the district court should have remanded them to the State courts in which they were originally filed. The Panel found that it did not need to resolve this issue, because the outcome of State court litigation over the construction and acceptability of § 354.6 was a foregone conclusion.

In the amendment to its opinion issued six weeks later (on March 6, 2003) (*see* App., pp. 1a-16a), the court noted that two California Court of Appeal panels had recently issued decisions that reached precisely opposite holdings on the critical question of whether the statute was substantive or procedural in nature. One court found that

§ 354.6 impermissibly purported to create a cause of action that would not otherwise exist, while the other opined that the statute was merely a procedural extension of the limitations period, raising no constitutional issues. *Compare Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39 (Feb. 6, 2003) *with Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (Jan. 15, 2003). Apparently, the existence of this actual conflict was not sufficient to persuade the circuit court that the ultimate resolution of this critical question of State law by the California courts is open to doubt.

Meanwhile, on April 30, the State Supreme Court granted review of both of these cases, 2003 Cal. LEXIS 2794. Argument will be heard some time in the coming months.

5. What Is at Stake in These Cases.

Petitioners respectfully submit that the court below erred, both procedurally in concluding that there is federal jurisdiction over these suits, and also substantively in affirming the order of dismissal.

These are cases of enormous public importance, which have attracted considerable attention from the media, as well as from the political branches of government. Indeed, the attention they have drawn is well merited: in this time when U.S. servicemen and servicewomen are once again subject to capture as prisoners of war far from these shores, it is especially important to elucidate the legal rights of the American heroes who wore their country's uniform during World War Two, and for whom this Court now offers the last hope for vindication.

The Court may surely take notice of the fact that Petitioners are no longer young: having suffered unspeakable abuse in 1942-45, the youngest of the survivors is nearly 80 years of age. Many are substantially older than that. These men represent the finest of the generation that fought and won the Second World War, incurring enormous personal loss to preserve our way of life against severe and

imminent threats. They deserve the attention of the highest Court in the land, which should now address and resolve the important legal questions that they respectfully present in this Petition.

REASONS FOR GRANTING THE WRIT

A. The Federal Courts Are without Subject-Matter Jurisdiction in Cases Brought under State Law, in Which Any and All Federal Claims Are Asserted by the Defense.

The competence of the federal courts to hear cases is limited. They may adjudicate an action only if constitutional or statutory authority permits. *Marathon Oil Co. v. Ruhrgas AG* 115 F.3d 315, (5th Cir.) *cert. denied* 522 U.S. 967 (1997). And cases begun there may be removed from State courts only if they come within that restricted federal jurisdictional field. The remand statute, 28 U.S.C. § 1446(a), is strictly construed **against** federal jurisdiction, as this Court has repeatedly taught. "To bring a case within the [federal-question removal] statute, a right or immunity created by the Constitution or laws of the United States **must be an element, and an essential one, of the plaintiff's cause of action.**" *Caterpillar, Inc. v. Williams* 482 U.S. 386, 392 (1987) (emphasis added) (quoting *Gully v. First Nat'l Bank* 299 U.S. 109, (1936).

The federal nature of a cause -- and hence the special jurisdiction of the federal courts under 28 U.S.C. § 1331 -- may not be created, for example, by the **defense** to a claim, when the claim itself arises under State law. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997), this Court described the "well-pleaded complaint rule" as "long settled law." Nor may a case be removed because the plaintiff **might** have asserted a federal claim but elected not to do so. *M. Nahas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 611 (8th Cir. 1991) ("the plaintiff is master of his claim, and may avoid federal removal jurisdiction by exclusive reliance on State law").

Here, of course, the complaints themselves declare no federal cause of action: on the contrary, they are clearly framed to allege common law and equitable causes of action under the laws of the State of California. Removal, therefore, was at least presumptively improper: "original federal jurisdiction is unavailable unless it appears that some substantial disputed question of federal law is a **necessary element of one of the well-pleaded State claims**, or that one of the other claims is 'really' one of federal law." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 13 (1982) (emphasis added).

At the district court, Judge Walker appears implicitly to have found that these cases come within an exception to the well-pleaded complaint rule, the so-called "complete preemption doctrine." When Congress has so thoroughly occupied and dominated an area as to leave no room for State law, **any** civil action will in essence be federal in character, and removal may be had no matter how the complaint is written. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65-66 (1987).

Yet the very rulings that define the doctrine make clear its inapplicability to such cases as these. States are surely not preempted from regulating the fairness with which their citizens are treated in the workplace, or from providing a mechanism for redress of such grievances.

In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court laid down the boundaries of the complete preemption doctrine. States may not regulate in a given field: (1) when Congress has made clear its intent to occupy the field exclusively, either by expressly prohibiting State involvement, or through a legislative framework leaving no room for State regulation; or (2) where there is an "actual conflict" between the requirements (or prohibitions) of State and federal law. 480 U.S. at 581 (citations omitted).

The key question, then, is whether Congress intended that State law be superseded by Federal law. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1994). Common law claims, such as the claims at Bar of employees against employers, are the best example of those "traditionally governed by State law," as to which preemption will be most unlikely. *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993). No federal statute purports in any manner to preempt these claims. And there are no obligations under federal law as to which these suits present an "actual conflict."

The "complete preemption doctrine" therefore does not apply to these lawsuits, which are concerned not with foreign affairs but with the right of workers to be paid, and not with diplomacy but with torts and equity. The plaintiffs' choice of the State court forum should be honored.

In the district court, Judge Walker claimed to follow "a line of cases committing to federal common law questions implicating the foreign relations of the United States," including *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). "Under *Banco Nacional*," he wrote, "federal common law governs matters concerning the foreign relations of the United States." 114 F. Supp. 2d at 943 (citation omitted); App. 71a.[4] But this reasoning, too, is of

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[4] In its decision below, the court of appeals paraphrased with approval its earlier remark that "[t]he federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism." *Gerling Global Reins. Corp. of America v. Low*, 240 F.3d 739, 751 n.9 (9th Cir. 2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3470 (2003). "The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years," *id.*, since *Zschernig v. Miller,* 389 U.S. 429, 433-35 (1968). The circuit correctly noted this Court's holding that a statute will not be struck down if it has only "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517 (1947). 317 F.3d 1005, 1021-22; App. 51a.

no avail. *Banco Nacional* neither channels cases into the federal courts nor precludes State courts from hearing lawsuits properly before them. *Banco Nacional* is "best regarded not as authority for an expansive federal common law of foreign affairs." Curtis Bradley & Jack Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 *Harv. L. Rev.* 815, 864 (1997). It is not judicial endorsement of the so-called "federal common law of foreign relations," nor does it establish a generalizable exception to the well-pleaded complaint rule.

Resolution of Petitioners' State law claims would not require that the trial court decide a substantive question of federal law. These claims do not "arise under" the laws of the United States within 28 U.S.C. § 1331, even if Respondents' answers and defenses are replete with reliance on federal law. *See Franchise Tax Bd v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 13 (1982), 463 U.S. at 13-14.

These cases should have been remanded, and it was reversible error to conclude otherwise. Respondents are by no means precluded from presenting their Treaty-based defenses in State court. And the disposition of those defenses is far from the foregone conclusion imagined by the appellate panel below. Indeed, the court's confidence that, on remand, "the State court would simply dismiss the claims with prejudice," 317 F.3d at 1030, is demonstrably erroneous.

B. A Federal Appellate Court May Not Resolve a Question of Interpretation of State Law, When the Only Two State Appellate Decisions on Point Are in Direct Conflict, and the Matter Is Currently Set for Resolution by the State Supreme Court.

The Ninth Circuit held that the extension of the statute of limitations in § 354.6 is unconstitutional as a substantive incursion by a State into the exclusive preserve of the federal government. The court considered its

interpretation of the State statute to be so clearly correct that it saw no reason to defer to the expertise and competence of the State judiciary.

Yet, in *Taiheiyo Cement Corp*, *supra*, decided in January of this year, a panel of the California Court of Appeal came to precisely the conclusion that the Ninth Circuit dismissed out of hand. The *Taiheiyo* court found that § 354.6 is "essentially a procedural statute designed to allow venue in the California courts." 105 Cal. App. 4th 398 at 423. Thus, there is no creation of a cause of action, no issue of constitutionality, and no incursion into the substantive regulation of foreign affairs that the federal appellate panel found the California Legislature to have committed.

"State courts are the principal expositors of State law." *Moore v. Sims*, 442 U.S. 415, 429 (1979). Federal courts, when they engage in that exercise, do so without "authoritative jurisdiction." *U.S. v. 37 Photographs*, 402 U.S. 363, 369 (1971).

Another panel of the same State court agreed with the Circuit, finding the statute to be substantive and therefore unenforceable, in *Mitsubishi Materials Corp, supra*, decided three weeks after *Taiheiyo*. The conflict in the interpretation of a State statute is now precisely where it should be in our federal system: the California Supreme Court has granted review to both decisions, and will resolve the matter in due course.

The interpretation of State law by the federal appellate panel below is entitled to no weight. The California Supreme Court will soon ultimately and authoritatively pronounce on whether the proper reading of the statute is as procedural or substantive. The decision below is grounded in a violation of a fundamental tenet of federalism, and should be set aside.

C. The Treaty of Peace with Japan Did Not Bar Actions by Private American Citizens Against the Private Japanese Companies That Mistreated and Enslaved Them.

The court below did **not** conclude that it is impermissible for California to have enacted **any** legislation purporting to regulate the rights of Californians who were victims of wrongs during World War Two. There would be no basis for such an unprecedented incursion by the federal courts into the authority of a State Legislature to protect its citizenry. The real problem, according to the opinion penned by Judge Reinhardt, is the alleged substantive inconsistency between California's enactment, under which these Petitioners have a cause of action against these Respondents, and the Treaty of Peace, which the panel believed waived such actions.

Petitioners respectfully submit that the panel erred in its interpretation of the Treaty, no reading of which can concoct a waiver of claims of private United States citizens against private entities organized under the laws of the former Axis powers. It therefore was incorrect in its conclusion that § 354.6 "is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." 317 F.3d 1005, 1023; App. at 47a. To the contrary, a proper reading of the document in its entirety and in its context demonstrates that these claims were **not** "resolved" by the Treaty.

As noted below, Article 14(b) of the Treaty of Peace makes reference to the waiver, subject to certain exceptions, of "all reparations claims" of U.S. nationals against Japan and Japanese nationals "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the War." Yet those words by their very terms do **not** waive **all** claims (whether "reparations claims" or not) of U.S. **prisoners of war** against Japanese companies (whether "arising out of . . . the prosecution of the War" or not), merely by virtue of the fact that they arose **during** the War years. This distinction is underscored by the express waiver, by Japan in Article 19(b), of the claims of its prisoners of war.

Having incorrectly held Article 14(b) to be a "resolution" of the claims at Bar, the panel also erred in rejecting Petitioners' arguments based on the language of an Article of the Treaty itself, under which certain claims, even if otherwise barred, were automatically revived in the event and to the extent that Japan later made "a peace settlement or war claims settlement with any State granting that State **greater advantages** than those provided by the present Treaty." Treaty of Peace, Article 26, emphasis added.

These conclusions are incorrect as a matter of law, and are inconsistent with teachings of this Court over decades. In reaching them, the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Rule 10(a). Moreover, the questions resolved by the appellate court are important questions of federal law "that ha[ve] not been, but should be, settled by this Court. Rule 10(b).

1. The Treaty Did Not Bar All Prisoner of War Claims.

Article 14(b) of the Treaty of Peace is clear:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

To the extent that Article 14(b) might affect claims of United States **nationals**, such as Petitioners, against Japanese **nationals**, such as Respondents, any waiver is expressly limited in two respects: (a) it is subject to whatever might be "otherwise provided" in the Treaty; and (b) it embraces only claims "arising out of any actions taken by Japan[ese] nationals in the course of the prosecution of the war." An

analysis of these limitations demonstrates that Article 14 does not constitute an effective waiver of the cases at Bar.

a. Other Provisions of the Treaty Limit the Waiver of Claims in Article 14.

The proper test for interpreting treaty language was laid down by this Court in *Eastern Air Lines Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991): interpretation of a treaty requires a close scrutiny of its text provisions **taken as a whole**. On such a reading, the drafters' intent **not** to bar private claims of Allied prisoners of war against the Japanese companies that enslaved them emerges unscathed. Article 14(b), which addresses waivers of **certain** claims of Allied nationals, has to be read in the context provided by Article 19, the parallel provision governing Japanese waivers. Neither exists in a vacuum. Understanding Article 14(b), therefore, and determining whether it is a "resolution" of war claims that bars State action, requires some analysis of Article 19.

In Article 19(a), Japan waived claims in language very much broader than what was accepted by the Allies in Article 14(b). Article 19 embraces not only claims resulting from actions taken in the course of prosecution of the War, but also "all claims . . . **arising out of the War** or **out of actions taken because of the existence of a state of war**." Emphasis added. Both the words and the history of this provision leave no room for doubt that it was intended to cover far more situations than would come within Article 14(b). Yet if even the more extensive scope of Article 19(a) does not unambiguously encompass and bar claims like Respondents', then surely Article 14(b) cannot be read to do so either.

The negotiators and drafters wrote Article 19(b) to include critically important language specifying that the waiver "includes . . . any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers." Such language, or indeed **any**

express reference to claims to be asserted by Allied POWs or civilian internees, is absent from Article 14(b).

The venerable maxim "*expressio unius est exclusio alterius*" is a proper guide to interpreting treaties, just as it is for statutory enactments. It requires the conclusion that, in expressly addressing prisoner of war claims in Article 19(b), the drafters **excluded** those claims from the scope of the waiver in Article 14(b). *See* Lord McNair, *The Law of Treaties* (1938), chapter XVIII, pp. 199-206. The context of the Treaty thus fills in the meaning of Article 14(b). It is a vital part of the judicial function to mine that context, and thus to discern the meaning of the Treaty as "the supreme law of the land."

The court below made no attempt to reconcile its broad interpretation of Article 14(b) as "resolving" war claims with the language of the Treaty as a whole, giving meaning to all of its terms. Article 19 contains "other provisions," which limit the reach of the waiver language of Article 14, and exclude common law claims of private U.S. citizens against private Japanese business entities.

Articles 14(b) and 19 must be read together, not because there would be ambiguity in one or both of them standing alone, but because they deal with related subject matters, and, therefore, each provides guidance as to how the other should be understood. To fail to perform this contextual analysis, and therefore to conclude that Article 14(b) must be read as if it were a free-standing legislative instrument, violates this Court's teaching, articulated most clearly by Justice Scalia in *Chan v. Korean Air Lines*, 490 U.S. 122 (1989): the judiciary must not insert into treaties words that are just not there. The courts may not amend the Treaty of Peace with Japan to import language that the drafters did not write into it. Article 14(b) may not be transformed into the mirror image of Article 19, from which it differs in critical ways, by importing words that the drafters did not employ.

The negotiating history -- the *travaux préparatoires* -- of the Treaty reinforces this conclusion. The historical record demonstrates without qualification or condition that the negotiators **deleted** an express reference to prisoner of war claims in Article 14(b), while retaining such a reference and expanding the scope of the waiver in Article 19(b).

Excerpts from the record,[5] which were before the district court below, show that the penultimate draft of the Treaty, dated June 1, 1951, included two elements relating to the scope of waivers which were changed by the negotiators in the final version. First, draft Article 15(d)[6] provided:

> Except as otherwise provided in the present Treaty, reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals (including juridical persons) arising out of any actions taken by Japan and its nationals **in the course of the prosecution of the war (including claims arising out of the treatment accorded by Japan to prisoners of war and civilian internees)**, and claims of the Allied Powers for direct military costs of occupation shall be deemed to be satisfied out of the Japanese assets subject to their respective jurisdiction in accordance with the foregoing and out of assets received from the Japanese home islands during occupation.

VI *Foreign Relations of the United States* (1951), at 1082.

Draft Article 19, by contrast, provided, in words which mirrored the waiver language ultimately incorporated in Article 14(b), that:

> (a) Japan waives all claims of Japan and its nationals (including juridical persons) against

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[5] Those excerpts are taken from VI *Foreign Relations of the United States* (1951), pp. 1074-1101.

[6] This provision was renumbered in the final text as Article 14(b).

> the Allied Powers and their nationals (including juridical persons) **arising out of any actions taken by said powers and their nationals in the course of the prosecution of the war**, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory proper to the coming into force of the present Treaty.
>
> (b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, **as well as any claims arising out of the treatment accorded by the Allied Powers to prisoners of war and civilian internees.**

Id., at 1093-94 (emphasis added).

The negotiators' treatment of the emphasized language demonstrates two propositions that cannot be ignored in any fair canvass of the *travaux préparatoires*: (1) the waiver provisions in the June 1, 1951 draft were originally worded to reflect each other **exactly**, with **both** limited to claims arising "out of the prosecution of the war," and (2) by dealing specifically with prisoner of war claims, **both** draft provisions addressed the negotiators' perception that the scope of the "prosecution of the war" phraseology, without elaboration, would not extend unambiguously to such claims. The negotiating history further shows that even this waiver, expressly including POW claims, was viewed at least by the British as **still** insufficiently broad to protect their Government against claims by Japanese prisoners of war. The U.K. representatives therefore sought, and obtained, the even broader, clearer waiver ultimately ratified as Article 19 in the final version of the Treaty. *Id.*, at 1095.

The exchanges between U.S. and British negotiators over the language of Articles 14(b) and 19 demonstrate that,

in the U.K. view, even with textual references to include prisoner of war claims expressly, the "prosecution of the war" waiver still would not be broad enough "to extinguish all types of claims which the Japanese could raise against the Allies under the 1929 Geneva Convention on Prisoners of War or in respect of Japanese surrendered personnel." Furthermore, to overcome any perceived limited scope of the draft waiver, the negotiators redrafted its language between June and September 1951, expanding the Japanese waiver in Article 19(b) to **include** all claims arising **during** the war, while **deleting** from Article 14(b) all language relating to prisoner of war claims.

All of the traditional guides to the interpretation of Article 14(b) of the Treaty -- its unambiguous language read in the context of the whole instrument, the canons of interpretation, and the *travaux préparatoires* -- lead to a single conclusion: Article 14(b) was not intended to bar the claims of Allied nationals held as prisoners of war by Japan, and forced to work to enrich private Japanese entities. These claims were not, therefore, even purportedly "resolved" by the Treaty, as the court below held, and the Treaty, therefore, does **not** evidence exclusive federal occupation of this area of constitutional territory.

b. Petitioners' Claims Did Not, in Fact, Arise from Actions Taken "in the Course of Prosecution of the War."

The second express textual limitation on the scope of the Treaty waiver clause is to actions taken "in the course of the prosecution of the War." Petitioners have already shown that the *travaux préparatoires* of the Treaty do **not** support the bald assertion that prisoner-of-war claims came within the drafters' understanding of the scope of the Article 14 waiver. The British negotiators expressly sought broader language to bar potential claims by Japanese internees against the Allies. And this fully comports with the international law regime for treatment of detained persons

during wartime, which applied to Japan and to the Allied Powers during World War Two.

Under the international law of war (*jus in bello*) applicable to all nations in the years 1939-45, the assignment of prisoner of war laborers to work for private parties was legal and acceptable **only** if their tasks had "**no connection** with the operations of the war."[7] If so assigned, laborers had to be paid "at rates in force for work of a similar kind," with their wages going "towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance." Hague Convention on the Law of War on Land, 36 Stat. 2277, T.S. 539 (1907), Article 6 (emphasis added); *see also* Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), Article 31.[8]

If Petitioners' allegations regarding their enslavement are true, then either Respondents acted illegally under international law, or their actions were not undertaken "in prosecution of the war." A successful showing by Respondents that their use of Petitioners' uncompensated, forced labor was "in the prosecution of the War" would constitute an admission of illegal acts, tantamount to a confession that the *zaibatsu* were perpetrators of war crimes. Yet the public record discloses no such confession in the years immediately following Japan's surrender, and no prosecution of any Japanese corporate officer for having used prisoners of war illegally. Unless Respondents are now prepared to admit that they committed such war crimes, they cannot take advantage of the waiver language in Article

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[7] International law also barred the assignment of "excessive" work to civilian internees.

[8] "[L]abor furnished by prisoners of war shall have no direct relation with the war operations. It is especially prohibited to use prisoners for manufacturing and transporting arms or munitions of any kind or for transporting material intended for combatant units." Geneva Convention Relating to the Treatment of Prisoners of War, Article 31.

14(b) as a matter of law.[9] And such a belated confession, offered in an attempt to obtain the shelter of Article 14(b), would violate the cardinal rule of domestic and international legal systems that no one should be permitted to profit from his own wrong.

Moreover, it is not only **not** self-evident, but it is demonstrably incorrect, that no distinction can be made between the Japanese Imperial government and the industries that supplied its economic base during the War. That very distinction was advocated by the United States and endorsed by this Court in *Kawakita v. United States*, 343 U.S. 717, 726 (1952) (although "[t]he regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy," it does **not** follow that the company was acting as part of the war effort, or that it somehow ceased to be "an organization operating for private profit under private management").

Petitioners have alleged, in well-pleaded complaints, that they were enslaved by Respondents during the War: that they were abused in various ways, and that they were forced to work without compensation in order to enrich private interests. That enrichment occurred, of course, in substantial measure because the *zaibatsu* were engaged in the supply of goods and services in support of the Japanese wartime economy. But that fact made those businesses identical to or agents of the Imperial government no more than Lockheed, Boeing, or any farmer or coal miner became indistinguishable from the United States by virtue of having supplied the American economy with transportation equipment or food products consumed during the Second

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[9] The Hague and Geneva Conventions are appropriate guides for the understanding and application of the terms of the 1951 San Francisco Peace Treaty. *See* Article 11.

World War, the Gulf War, or the current War on Terrorism. That Dow Chemical manufactured Agent Orange for use in Vietnam does not imply that its factory workers acted "in the course of the prosecution" of the Vietnam War.

Respondents, therefore, cannot demonstrate that, as a matter of fact, their exaction of Petitioners' labor was in the "prosecution of the war" as that phrase was used in the Treaty.[10] Article 14(b) does not take away the right of POWs to sue their abusers, because Petitioners' claims are not within the categories that the language of the Treaty embraces. The conclusion of the court below that Article 14(b) "resolves" these claims must therefore be reversed.

c. Petitioners' Claims Neither Are, Nor Are Similar to, "Reparations" Claims.

The Treaty, in Article 14(b), purports to waive "all **reparations** claims of the Allied Powers, [and] **other** claims of the Allied Powers **and their nationals** . . ." (emphasis added). Although this language would appear to reflect a common understanding that the claims of nationals (such as those of POWs), as opposed to claims of the Allies themselves, are not "reparations claims," Petitioners submit that theirs are so **dissimilar** to reparations claims that they cannot be included in the catch-all word "other."

Reparations -- a term of art in international law then and now -- are payments made **by governments** for injuries inflicted in the course of hostilities. They are paid, typically and traditionally, also **to governments**, for distribution, often according to a negotiated formula or procedure, to those able to prove that they were victims of the

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[10] There is nothing counterintuitive about this result. The words "the prosecution of the War," in their common meanings, refer to what **governments** do. It is governments, acting through, among others, their nationals in their military service, that make wars: private companies such as Respondents may be enlisted in their aid, but they cannot be said to be "prosecuting" (*i.e.*, spearheading, carrying out) the war effort merely because they continue to operate their businesses during wartime. The prosecution of wars in this country is a military function. *See* 32 C.F.R. § 368.6.

belligerency. Thus, in the *Reparations for Injuries Suffered in the Service of the United Nations Case*, [1949] I.C.J. 174, the International Court of Justice was called upon to advise whether the United Nations had sufficient international legal personality – enough resemblance to a nation – to be able to demand "reparations" from the nascent State of Israel for the murder of Count Bernadotte, the U.N. peacekeeper in Jerusalem, by commandos operating under what was to become the Israeli military structure.

Furthermore, it is true that Article 14(b) of the Treaty sets out a waiver of reparations claims "and other claims," but this language must properly be construed according to the rule of textual interpretation usually called *ejusdem generis*: the general items in a list must be read as members of the same family as the specific ones. *United States v. Espy*, 145 F.3d 1369 (D.C. Cir. 1998); *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). The use of terms like "and others" or "etc." is not the way in which entire classes of unspoken assumptions are expressed, or important personal rights of untold numbers of people gained and lost. The breadth of the category of "reparations claims [and] other claims" does not extend to private claims of private individuals against private companies, unless those claims arose from actions taken "in prosecution of the War": in other words, unless they are of the same family of claims as the others waived in Article 14.

2. Any Treaty Waiver of Petitioners' Claims Was Superseded by Subsequent Developments.

Both to ensure fairness to those nations that did not resolve their war claims against Japan through the 1951 Treaty, and to avoid prejudice to the Allied Powers that were parties to that instrument, it was agreed as follows:

> Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan . . . which is not a signatory of the present Treaty, a bilateral

> Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty. . . . Should Japan make a peace settlement or war claims settlement with any State granting that State **greater advantages** than those provided by the present Treaty, the same advantages **shall** be extended to the parties to the present Treaty.

Article 26, emphasis added. The text, ratified by the President of the United States after receiving the advice and consent of the Senate, included this language, which is every bit as much "the supreme law of the land," under Article VI of the Constitution, as the remainder of the Treaty's provisions.

In fact, Japan did subsequently make a number of "peace settlement[s] or war claims settlement[s] . . . granting [certain] State[s] . . . advantages" that were "greater . . . than those provided by" the San Francisco document, to the extent that it has been interpreted by the courts below to include a renunciation of national-vs.-national claims. Certain states other than the listed Peace Treaty signatories were granted settlements without waivers of private claims: an obvious advantage for their nationals, in comparison with the situation of United States citizens whose claims the panel below found to have been sacrificed by their government. Thus, even if the court below were correct in its interpretation of Article 14(b), those advantages would automatically be extended to the United States, according to the express language of Article 26.

On another point, the court below agreed with the district court in its interpretation of this Treaty provision, concluding that it "confers rights only on the 'parties' to the treaties, not on individuals."[11] 317 F.3d 1005, 1026; App.,

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[11] Judge Walker's conclusion, adopted by the Ninth Circuit., is also internally inconsistent or at least asymmetric. On that reading, Article 14(b) extends rights only to governments, not to private entities, such as Petitioners here. Yet the reading below permits Respondents the right to

p. 51a. But the provision of the Treaty **does** in fact "confer rights" on individuals, because it is part of United States law, and it contains express language to the effect that the United States "shall" have the "greater advantages" given by Japan to other nations. Since the record clearly indicates that the United States has never renounced these rights, there is no basis for the refusal of the courts below to take note of Japan's own subsequent actions, made relevant (indeed, made essential) to this analysis by the express language of Article 26.

Article 26 is a "most-favored-nation clause," a species of draftsmanship often seen in commercial contracts. It means that if either party extends a preference to any other entity at any later time, as compared with the instant contract partner, that benefit is immediately and automatically extended to the other without the need for a new agreement or any implementation. Thus, in *Kolovrat v. Oregon*, 366 U.S. 187, 193-96 (1961), this Court unanimously interpreted an 1881 treaty between the United States and Serbia, 60 Stat. 1401, T.I.A.S. 1501, containing a most-favored-nation clause, in light of both a pre-existing treaty of the United States (as it happened, one with Argentina, 10 Stat. 1005 (1853)), and later treaties between Serbia and Poland and Czechoslovakia (30 L.N.T.S. 185; 85 L.N.T.S. 455). The Court found the greater advantages contained in those documents to govern, recognizing that most-favored-nation clauses have "long [been] used to broaden the scope of rights protected by treaties." 366 U.S. at 195.

There is nothing unusual or counterintuitive about the concept that the rights of Americans may be interpreted in light of subsequent developments in the international arena. Identifying the operative principles and binding norms of international law may well require analysis of what other

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rely upon and to hide behind a supposed waiver of claims against them, while denying Petitioners any reciprocal right to enforce provisions which serve to explain, limit, or terminate the effect of that waiver.

countries do or have done, but that focus is well within the traditional mainstream of American jurisprudence.

That customary and conventional international law is part of the law of the United States, and has been so since the earliest days of the Republic, is far beyond dispute. Justice Gray's famous pronouncement in *The Paquete Habana*, 177 U.S. 677, 700(1900), is precisely this: "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."

When, as in *The Paquete Habana* or *Kolovrat*, a legal instrument such as a Presidential Proclamation or a treaty makes reference to the possibility of subsequent development, there is no contradiction in defining the content of domestic law by reference to, and therefore as potentially to be changed by, those later events. Here, the Treaty says not that its text becomes null and void, or is subject to renegotiation, should another war claims settlement agreement involving Japan confer greater benefits on another country. It says that those additional advantages **shall** be extended to the Treaty parties, including the United States. No "right" to "invoke" this provision need be asserted by anyone. The conclusion below that the United States government must perform some affirmative act to be entitled to this provision is simply without authority in the Treaty text or the relevant caselaw.

Petitioners' contention, therefore, is grounded in the very words of the Treaty: if another nation settles its war claims with Japan in a way that does **not** deprive its citizens of the right to pursue judicial remedies for wrongs done by private Japanese interests, then American citizens "shall" have the same right. Even if such claims had been deemed "waived" before the date of such a more advantageous agreement, from that date forward, U.S. law would no longer be obligated to treat them as waived. The Treaty requires

Japan to extend the corresponding advantages to the U.S. automatically, and thus by extension to its nationals.

At least three war claims settlements of Japan do not purport to abandon, or otherwise to affect in any manner, claims against Japanese nationals, by whomsoever they might be asserted, or whenever they may have arisen. Rather, they expressly waive claims only against Japan's government.

Japan's agreement with Denmark[12] extends only to the Japanese government, and does not release claims against Japanese nationals: *see* Article III. The agreement between Japan and Sweden[13] is identical. The agreement between Japan and Spain[14] addresses the settlement of "certain types" of Spanish war claims, providing only for full and final discharge of the government of Japan for claims against it, making no reference to, and therefore offering no release of, claims between nationals of the two countries.

All of these provisions are clearly more advantageous than those in Article 14(b) of the Treaty, if that language is read – as the appeals court read it below – as precluding Petitioners' claims: they permit the pursuit of legal actions by private citizens against private companies. By the explicit language of the San Francisco Treaty, therefore, the right to bring the actions at Bar, not even purportedly affected by these other instruments signed by Japan, automatically re-vested in citizens of the United States, even if the Treaty were to be construed as having taken those rights away.

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[12] Arrangement between the Governments of Japan and Denmark Regarding Settlement of Certain Danish Claims (May 25, 1959), [1960] *Japanese Annual of Int'l Law* 203.

[13] Arrangement Between the Governments of Japan and Sweden Regarding Settlement of Certain Swedish Claims (September 20, 1957), [1959] *Japanese Annual of Int'l Law* 186.

[14] Exchange of Notes Between the Government of Japan and the Government of Spain Regarding the Settlement of the Problem Concerning Certain Types of Spanish Claims (January 8, 1957), [1958] *Japanese Annual of Int'l Law* 211.

The very existence of these three war claims settlement agreements, therefore, considered in light of the language of Article 26, and the express exception in the Article 14(b) waiver itself regarding what is "otherwise provided" in the Treaty, means that private claims by United States nationals against any national of Japan -- including the Japanese-incorporated Appellees named in these actions – are **not** foreclosed by Article 14(b).

Japan also entered into an agreement with the Soviet Union, which **did** purport to waive claims by Soviets against Japanese citizens.[15] The scope of that waiver, however, was expressly limited to claims that arose after August 9, 1945: claims arising before then were unaddressed. Petitioners' claims, however, arose significantly before that date, just days before the unconditional Japanese surrender. The agreement with the Soviet Union too, therefore, confers "advantages" not extended to the United States, assuming that the interpretation of the Treaty in the court below is correct.

Petitioners urge the Court to consider carefully and critically the very words of the Treaty itself which expressly, in light of the subsequent conduct of Japan, recognize their right to pursue private lawsuits alleging misconduct by Japanese non-government entities during the War. Nationals of certain other nations that later settled their claims with Japan have not lost their right to sue individual wrongdoers: an "advantage" that the decision below, if allowed to stand, would deny to U.S. citizens. The Treaty rectifies that imbalance, and the Treaty, including Article 26, is part of the laws of our country that the courts are bound to interpret and to apply.

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[15] *See* Joint Declarations by the Union Soviet Socialist Republics and Japan (October 19, 1956), [1957] U.N.T.S. 112, ¶ 6.

3. The Treaty Must Be Read Narrowly, So As Not to Deprive Americans of the Right to Pursue "National versus National" Claims.

There is another reason for Petitioners' position that the Treaty does not purport to deprive them of their private claims, and so does not represent a federal "resolution" that precludes the California statute. The Treaty should be presumed to be constitutional, requiring a reading in which it did not take the rights of American citizens away from them without compensation, as required under the Fifth Amendment, unless no other interpretation is possible.

This Court provided a comprehensive overview of the powers of the President in this area in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). *Dames & Moore,* however, says nothing about "national versus national" claims. Rather, in *Dames & Moore*, the Court addressed the Algiers Accords, an agreement that affected claims by nationals of the U.S. only against the Government of Iran, along with its agencies and instrumentalities, not private Iranian citizens or interests.

Petitioners do not contest the proposition that a sovereign government like ours may settle the claims of its nationals against foreign states. That is an aspect of sovereignty recognized in international law. But under United States constitutional law, the uncompensated "taking" of a viable claim, which is a property right, is unconstitutional. *Id.*, at 688-690. Adhering to the principle that executive action in the formation of international undertakings should be presumed to be consistent with the Constitution, Petitioners submit that an interpretation of the Treaty as not depriving Americans of their right to property is to be preferred.

That the waiver of "national versus national" claims would implicate constitutional limits on the powers to make treaties or to conduct foreign relations is not an assertion concocted out of whole cloth by Petitioners. This is the very position taken by the United States Government recently

regarding the settlement of forced labor claims by Holocaust victims against German companies.

On July 17, 2000, the President entered into Executive Agreements with the Federal Republic of Germany concerning the resolution of Holocaust-related claims (including forced labor claims) against German nationals and German companies, through the establishment of a foundation, "Remembrance, Responsibility and the Future." In those Agreements, however, the President took precisely the position urged by Petitioners: that claims like theirs are simply not his to negotiate away. *See* excerpts at pp. 121a-131a, *infra*.

The United States recognized "the importance of . . . all-embracing and enduring legal peace," although acknowledging that private lawsuits had been brought in the federal courts. Noting that "it would be in the foreign policy interests of the United States" for the Foundation "to be the exclusive remedy" for resolving Holocaust claims by U.S. nationals against German companies, and that dismissal of the private lawsuits was therefore desirable, the government could do no more than commit that **it** "will not raise any reparations claims against the Federal Republic of Germany," and undertake that it would "**recommend** dismissal [of pending national versus national lawsuits] on any valid ground." Agreement between the U.S. and Germany, signed July 17, 2000, Annex B, ¶ 3, App. p. 125a (emphasis added).

Thus the Executive Branch expressly **rejected** Germany's demand that Holocaust-related forced labor claims be waived by government fiat. The United States took the position that whether or not these claims could be pursued in U.S. courts was "under the U.S. system of jurisprudence, for the U.S. courts to determine." *Id.* The United States could take "no position here on the merits of the legal claims in arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves

provide an independent legal basis for dismissal." *Id.* at ¶ 7; *see also* S. D. Murphy, "Nazi-Era Claims Against German Companies, 94 *Am. J. Int'l L.* 682, 683-84 (2000).

The conclusions of the court below in this regard are also inconsistent with the clearly-expressed intent of the actual negotiators of the San Francisco Treaty with respect to the scope of Article 14(b). The U.S. negotiating team wanted an unrestricted, broad waiver of all wartime claims. Yet it is beyond challenge that Ambassador (later Secretary of State) John Foster Dulles was forced to compromise on that goal, because other Treaty partners rejected it in whole or in part.

The court below simply assumed that the federal government has the authority to waive "national versus national" claims, and that it did so in this case. But such a move would have been utterly unprecedented in American history. The negotiators themselves did not intend the Article 14(b) waiver to extend to "national claims under private law." This is further support for the view that Article 14(b) must be construed narrowly, leaving unaffected the rights of U.S. nationals to pursue private claims against Japanese nationals.

The court below, in misconstruing the Treaty, reached the erroneous conclusion that the federal government has somehow precluded the State of California from enacting legislative measures to protect its citizens and others, who may come into court to defend rights accruing under the statutes and common law of the State. That conclusion is unwarranted as a matter of law, and should be reversed.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue.

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